A LANDOWNER'S (INFORMAL) GUIDE TO NEGOTIATING FOR A WIND FARM

Commercial scale wind developments, typically referred to as wind farms, have been around since the early 1980s and have increased in numbers in recent years. Montana has extensive wind resources. Wind developers are looking for suitable sites around the state. If you're interested in offering your property as a site for a wind farm, you need to think about how you'll make money from the project. *If you're serious, after reading this, hire a professional to help you negotiate with wind developers.*

First Things First

Just because the wind blows a lot at your place does not mean you have a site developers will find suitable for a wind farm. Your property needs to be within a few miles of a transmission or three-phase distribution line and have no obvious environmental concerns, such as large numbers of birds. Access to good roads also is an issue.

Most of all, you'll need evidence that the wind resource is good enough for commercial development. Physical evidence of high winds is a start. Wind prospectors look for things such as trees and bushes bent over and deformed by the prevailing wind. Wind measurements on nearby properties are better yet. The National Weather Service maintains a map of many of the public wind monitoring sites. Other agencies and private concerns are monitoring wind around Montana for a variety of reasons; you might be able to get access to those data.

Ultimately, the wind across your property will need to be measured. This means one or more towers 10 to 60 meters tall (33 to 200 feet) will be put up to hold one or more anemometers, measuring wind speed, and wind vanes, measuring wind direction. Usually these need to be up and gathering data for a year or more to determine if the wind resource is worth serious consideration.

You might put up the anemometer yourself, but you're better off contacting an agency such as DEQ, private consultants or a commercial developer to do the monitoring. There's also a chance that a developer will contact you. Many of the larger developers currently working on projects in the United States are listed at the American Wind Energy Association website. Several smaller, local developers also are working in Montana. However you start working with a developer, you need some sort of legal arrangement to proceed.

Dealing with Developers

Developers will want some kind of exclusive right to develop wind energy projects on your property. Building a wind farm takes time and money, which developers won't risk if they might lose access to the site. The developer has to analyze the wind resource and the capacity of the transmission lines to ship the farm's output, obtain any necessary

permits and most importantly, locate a creditworthy purchaser for the farm's output. The energy sales document is called a power purchase agreement (PPA) and is between the owner of the project and the buyer, usually some utility. Without a PPA, no developer can guarantee that they will build on your land.

As with any industry, some developers are more reputable than others. Wind deals are no different than any other business deal. If it sounds too good to be true, it probably is. Developers should be willing to answer questions, and landowners should investigate a developer's history. Ask the developer about their last project. If there's no solid answer to this question, you're either starting to a start-up company—possible at this early stage of the industry in Montana—or you may be talking to a land speculator.

When working with a wind farm developer you need to be aware of the amount of money that a potential wind site may be worth. While option payments usually are negotiated before wind prospecting takes place, the value of the long term contract should be contingent on the measured wind potential on your property. The monetary worth of the wind should be tied to what the possible output would be from a scaled-up wind farm. If you retain control of the land, you probably will receive some sort of minimum payment guarantees (usually on a per turbine basis) and royalties. The royalties will provide the bulk of your compensation and should be your major concern.

The royalty is a percentage of the gross revenue of the project paid annually and generally has been between two and four percent depending upon the region of the country and what price the electricity market is at. For instance, a 1 MegaWatt (MW) turbine might be expected to generate about 3,000 MegaWatt hours (MWh) per year on average. If the developer can sell the output for $35/MWh and the royalty is three percent, each turbine would produce $3,150 per year in royalties. (Actual calculations will be more complicated.) Depending on the size of the machine, the terrain and the wind resource, you could expect as many as 10 to 20 turbines per section.

There are non-financial issues to keep in mind when deciding how to allow the developer to build on your land. Installing large wind turbines on your property could affect your operation. Any large-scale wind farm will have roads built to access to all the turbines, plus any substations or transformers that will be a part of the project. Access will need to be granted not only for the actual installation but also for preliminary assessments and routine maintenance and operation. Any problems these activities might cause can be minimized, but they shouldn't be overlooked in your negotiations.

Wind farms have environmental impacts that you need to consider. While the newer and larger turbines are fairly quiet, smaller machines and refurbished older machines can be noisy and should be sited appropriately. Wind turbines can be extremely tall, with the tips topping out as much as 400 feet above the ground. Many find turbines esthetically pleasing, while others don't. Be sure how you feel before the turbines are erected.

Giving Developers Access

Landowners can choose from a variety of methods to give developers access to their resources. They are:

- Grant an option to purchase or lease the land
- Sell the land
- Lease the land
- Grant an easement providing wind access
- Place restrictive covenants on the land
- Grant, permit, or license the use of the land or its resources

Often, a combination of these options is used. The most common arrangement is a renewable short-term lease combined with an option to lease the land for a longer period. The short-term lease is used to acquire site control for resource measurements, project feasibility studies, power marketing efforts including proposals, and permitting. If the project is a "go" or at the end of the short-term lease, the option may be exercised and a long-term lease executed. If not, the lease is not renewed.

A wind farm can be in operation for 20 years or longer. The developer may offer an agreement with an automatic extension of the operational term. You should consider requiring the financial terms of the agreement be reviewed at the time the agreement is extended.

Option to Purchase or Lease

Instead of an immediate purchase or lease, the developer can buy an option by paying the landowner a sum, usually a small percentage of the property value. The option holds the property off the market while the developer determines whether to make a final purchase or lease. The terms of the final purchase or lease are negotiated and set forth in the option agreement.

The developer may acquire a right to use the land during the option period to test the resource or perform other activities. Two agreements are needed for the developer to obtain the right to purchase or lease the property later and the right to install testing devices: an option's agreement, and a short-term lease or license agreement. Either a license or lease arrangement would allow the developer to use the land during the option period.

At the end of the option period the developer must decide whether to purchase or lease the property at the price and terms in the option agreement, or to give up all interest in the land. An option assures that the developer can use the property for a set price in the future. However, if research shows that the resource is less valuable or a project more difficult than first thought, the developer is not bound to buy or lease the property.

The landowner cannot accept any better offer during the option period. The option price should adequately compensate the landowner for keeping the property off the market. The value of an option right depends on the length of the option period and the strength of the resource. If more than one developer wants to buy an option, the competition will increase its value.

Right of First Refusal

A right of first refusal can be confused with an option to purchase. Unlike an option, a right of first refusal does not set a price for the property. A developer who buys a right of first refusal merely obtains a right to match any offer to buy the property. If the offer can and will be matched, then the right holder gets the property. Thus, a landowner that receives an acceptable offer from a third party would be required to communicate the offer to the developer holding the right. The developer may either match the offer or obtain the property or allow the property to be acquired by the offeror.

A landowner may specify that a right of first refusal does not apply to offers to purchase made by specific parties such as family members. This allows the landowner to transfer ownership within a family while granting a developer a right of first refusal on offers made by others.

A right of first refusal is usually an effective tool to keep others from acquiring site control. Others are not willing to invest the cost and effort to negotiate a deal if they can easily be displaced by a competing party who may have invested no more than the cost of the right.

Sale

A landowner who sells the property to a developer transfers all interest and control in the property and its energy resources for a fixed price. The landowner does not incur the risks of development. The developer pays the market value of the property, taking into consideration any value added by the resource. A landowner that is paid in full need not be concerned with the development. However, a landowner that is to be paid over time from the project's electric sales revenues may retain some control over the property and its development as security for future payment. A landowner that wants to use the property for farming or grazing can lease back the property sold to the developer.

Lease

Commonly, instead of selling the property, the landowner leases it to the developer for fixed terms. A lease agreement allows the landowner to retain some control over the development and use of the land. Make sure you understand exactly how much land will be needed by the developer to site the turbines, transformers or substations, roads (including any anticipated roads for future development) and the pathway for the transmission towers (power poles) and power lines. The lease should also make sure where the liability is placed, which is usually with the developer. A lease should specify liabilities from any damage from fires, spills of hazardous materials, damage to the environment, wildlife, vegetation, soil erosion, aesthetics, noise abatement, habitat destruction, or other possible mitigation needed that could affect the landowner.

Leasing values and how the lease payments are structured can vary widely. Each site is different and any specifics to the site should be taken into account, such as value of the land, value of property on the land (trees, wildlife, aesthetics, etc.), future property value, and most importantly whether the wind farm will decrease the value of the rest of the

land around the wind turbine site. If the wind turbine siting makes all the rest of the owner's property valueless to other future developments, then that should be a major consideration taken into account during leasing negotiations.

Covenant

When property is sold, restrictions may be placed in a purchaser's deed prohibiting certain uses of the land. A developer who acquires only part of a larger parcel can ask the landowner to agree that when other parcels are sold, the deeds will contain restrictive covenants prohibiting new owners from obstructing the developer's access to the site. The value of these covenants should be reflected in the price the landowner receives from the developer.

Easement

A developer who purchases or leases property for an energy project may still have problems to solve. Wind turbines must have on-going access to undisturbed wind flow. The developer can prevent obstructions on the site but has no authority to prevent obstructions on adjoining properties. This may not be a problem if siting standards require sufficient setbacks.

A developer may acquire control over enough land to install turbines, but not enough to assure wind access. If the wind is later blocked by an adjoining property owner, the developer could take legal action to have the obstruction removed. If the adjacent landowner has agreed not to obstruct access or a statute or local ordinance has been enacted forbidding such obstructions, the developer could prevail. But, without such agreement or law, the adjacent landowner has no obligation to the neighbor. In such cases, negotiating an easement would be critical. The developer would pay an adjacent landowner some amount to put restrictions on future use of that land, even if it was sold.

Permit or License

The landowner may grant the developer a permit or license to use the land or airspace for a specified time or purpose. This right is generally revocable at the landowner's will and may not be transferred or assigned. The developer who acquires a personal license or permit does not acquire a legal interest in land that can be recorded or mortgaged. For this reason, developers usually aren't interested in permits or licenses

Contract Provisions

Regardless of the type of interest acquired, the typical contract between the landowner and developer will have common provisions. However, there is no standard contract. The parties may select any terms for the agreement. Contracts developed for one purpose, such as oil and gas leases, may not be appropriate for wind development. The parties should design a contract that meets their needs.

Some Other Legal issues

Before entering into any contract, the parties should obtain a title report from a title insurance company. For a fee, the title company will provide a report stating the record owner of the land and any outstanding liens or encumbrances on the property. The developer should inspect the property to determine if there are any viable but unrecorded encumbrances or easements on the property. The contract should specify whether the landowner has any obligation to remove any liens or encumbrances or whether the developer's acquired interest is subject to those pre-existing interests.

Landowners should review their insurance policies before signing any contract. If a policy's coverage would be affected by wind development on the land, a landowner can negotiate with the developer and add provisions to the contract to compensate.

Landowners should discuss taxes with the developer and with an attorney. Determine who will pay the property taxes, whether the developer will pay for increases in property tax caused by improvements (usually this is the case), and who will pay taxes on the sale of electricity. Discuss whether one party will pay taxes owed by the other party if non-payment would result in a lien or foreclosure on the property.

Wind turbines may be sited on Conservation Reserve Program (CRP) and grassland easements. The 2002 Farm Bill allows farmers to install wind turbines on CRP lands subject to the approval of the USDA. CRP payments are not reduced based on this activity. USDA can specify the number and location of turbines and will only allow if consistent with CRP goals for the land.

Other Resources

Montana Department of Environmental Quality wind website.

Permitting of Wind Energy Facilities: A Handbook (PDF file), National Wind Coordinating Committee, August 2002.

U.S. Department of Energy's Wind Powering America is the federal government's main site for information on wind power.

Wind Energy Resources and Technologies: Information Sources, compiled by the U.S. Department of Energy.

Source

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